

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONTE S. MITCHELL,

Plaintiff

-vs-

MEMORANDUM and ORDER

06-CV-6197-CJS-MWP

COMMISSIONER GLENN S. GOORD, *et al.*,

Defendants.

Siragusa, J. This case was referred to United States Magistrate Judge Marian W. Payson, pursuant to 28 U.S.C. § 636(b)(1), on April 21, 2006. (Doc. No. 5.) On August 24, 2011, Judge Payson filed a Report and Recommendation (Doc. No. 72) in regard to Plaintiff's motion (Doc. No. 61) to amend the complaint. Judge Payson recommended that the Court deny the motion, with the exception of substituting one party. On September 19, 2011, Plaintiff filed objections to the Report and Recommendation. (Doc. No. 74.) The Court has reviewed the Report and Recommendation *de novo* as a result of Plaintiff's objections, as required by 28 U.S.C. § 636(b)(1). Upon *de novo* review, the Court accepts the Report and Recommendation in whole.

Plaintiff's motion to amend comes more than nineteen months after the deadline set by the Court, and four years after Defendants filed their answer to the original complaint. Although the Court understands Plaintiff's point that his *pro bono* counsel was not diligent in seeking an amendment, the Court also notes that after *pro bono* counsel was relieved, Plaintiff did not exercise due diligence to make an application to amend. Counsel was relieved on November 16, 2010 (Doc. No. 58), Plaintiff's application was not docketed until

January 3, 2011. Moreover, as Judge Payson points out, the claims he makes in the proposed amended complaint are barred by the statute of limitations and the Court agrees that the relation back doctrine does not apply in this case.

Consequently, Plaintiff's motion to amend (Doc. No. 61) is denied, with the exception that (1) claims against defendant John Burge are withdrawn and dismissed, and (2) Department of Correctional and Community Services Commissioner Brian Fisher is substituted for the former Commissioner of the Department of Correctional Services, Glenn Goord, with regard to all claims made against defendant Goord in his official capacity.

IT IS SO ORDERED.

Dated: October 5, 2011
Rochester, New York

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge